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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SHANNON RAYNELL PATTERSON, Defendant and Appellant.	E059936 (Super.Ct.No. RIF1202817) OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed.

Paul Stubb, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Meagan Beale, and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

On April 29, 2013, the prosecutor filed an amended information charging defendant and appellant Shannon Raynell Patterson with false imprisonment with

violence or menace under Penal Code[1] section 236 (count 1); failure to register as a sex offender under section 290.010 (count 2); and domestic battery under section 243, subdivision (e)(1) (count 3). The information also alleged that defendant had suffered two prison priors under section 667.5, subdivision (b), and that one of the priors was also a serious and violent felony under sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1).

Defendant entered not guilty pleas and denied the prior convictions. On May 3, 2013, the matter proceeded to jury trial. On May 8, 2013, defendant failed to appear and a bench warrant issued. The trial was continued for one day. On May 9, 2013, defendant again failed to appear; defense counsel moved for a mistrial. The court denied the motion, finding defendant's absence voluntary. The case was then submitted to the jury. The jury returned guilty verdicts on all counts.

On October 25, 2013, the trial court denied defendant's motion to dismiss the prior strike allegations. At the same hearing, defendant admitted serving two prior prison terms under section 667.5, subdivision (b), and his prior conviction under sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). That same day, the trial court sentenced defendant to an aggregate term of seven years, four months in prison. As to count 1, the court imposed the middle term of two years, doubled per the prior strike conviction. As to count 2, the court imposed and doubled the middle term for a total of one year and four months, to be served consecutively. As to count 3, the court ordered a

[1] All further statutory references are to the Penal Code unless otherwise indicated.

concurrent 180 days in jail. For each prior prison term, the court ordered a consecutive one year in prison.

On October 28, 2013, defendant filed a notice of appeal. On appeal, defendant contends that the trial court should have stayed his sentence on count 3 under section 654 because the convictions in counts 1 and 3 are based on the same underlying conduct. For the reasons set forth below, we find that the trial court properly imposed defendant's sentence.

FACTUAL AND PROCEDURAL HISTORY

The victim and defendant worked together at a packaging warehouse in Corona; they eventually began dating "a couple of months" prior to February 26, 2012. Shortly after they started to date, defendant moved into a garage across the street from where the victim lived. They dated for months but the victim decided to end the relationship when defendant became increasingly aggressive and jealous. The first time the victim attempted to break up with defendant, he pushed the victim and her three-year-old daughter into a bedroom. He did not calm down or let them out until the victim assured him that she had changed her mind and they would discuss it more at later time.

On February 26, 2012, defendant and the victim were working, when he almost struck her arm with a blade he used to open packages. When the victim asked why he did that, defendant responded, "'I don't care.'" The victim believed that defendant was acting aggressively with her. Their work required the use of a blade, but defendant brought his own to work, which was longer than the "normal" type used by other employees. Defendant then accused the victim of being interested in another man. The

victim denied the allegation. Defendant asked the victim to meet him after work to discuss the issue further. The victim agreed. The two left work together that day. The victim drove them to a park and parked her truck in the parking lot. After turning off the ignition, she removed the keys and held them in her hand.

Defendant again accused the victim of being unfaithful; the victim attempted to end their relationship. Defendant said "no" and the victim tried to leave. Defendant stated, "'No, you're not gonna go,'" and yanked the keys from the victim's hands by force. The victim tried to get out of the car, but defendant grabbed her. Defendant was shouting at the victim, and he physically grabbed her arms and pulled her down toward the floor of the truck. A struggle ensued as she tried to get out of the truck and he pushed her down onto the seat. The victim honked the horn in an effort to summon help. Defendant then pulled out his blade and brandished it at her. The victim asked if he planned to kill her.

When the victim looked up, she saw a woman, later identified as Jessica Lee, standing outside the truck looking at them. Lee's car was parked next to the truck; she had returned to the car with her son after attending a birthday party in the park. As she was securing her son in his car seat, she heard honking coming from the truck. She saw defendant "flailing" around in the car and suspected that he was having a seizure. She immediately called 911. Then Lee heard two voices coming from the truck; it sounded like the two people were fighting. When defendant looked at Lee, she asked, "'Is everything okay?'" Defendant jumped out of the car and said, "'Don't be calling anyone. Everything's okay here.'" The victim, looking worried, said, "Yes, call." Lee provided

the 911 dispatcher with the truck's license plate number, removed her son from the car seat, and quickly walked away from the situation.

Defendant got back in the truck and continued struggling with the victim. He covered her mouth with his hand and laid on top of her. The victim was afraid. Finally, the victim told defendant he better leave or else the police would come. Defendant got nervous, exited the truck, and left the park on foot. The victim waited five minutes then drove home. The entire exchange lasted about 15 minutes.

Police responded to the victim's house after they were unable to locate the truck at the park. The victim explained what happened and showed the officers her bruises on both arms and her neck. As part of the investigation, the police discovered that defendant was required to register as a sex offender; defendant had failed register while living in Corona.

DISCUSSION

Defendant contends the trial court should have stayed his sentence on count 3 under section 654 because his convictions in count 1 (false imprisonment with violence or menace) and count 3 (domestic battery) are based on the same underlying offense.

Section 654, subdivision (a), provides in pertinent part that, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The purpose of section 654 is to ensure that punishment is commensurate with a defendant's culpability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) The

proscription applies to a course of conduct violating more than one statute, where the offenses were incident to one objective. (*People v. Martinez* (2005) 132 Cal.App.4th 531, 535.)

Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. Under California law, it is the defendant's intent and objective that determines whether the course of conduct is indivisible. Thus, if """all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.""" (*People v. Le* (2006) 136 Cal.App.4th 925, 931.) Moreover, section 654 prohibits multiple punishments, not multiple convictions. Thus, the section's proscription extends to include both concurrent and consecutive sentences. (*In re Adams* (1975) 14 Cal.3d 629, 636.)

"[S]ection 654 does not apply when the evidence discloses that a defendant entertained multiple criminal objectives independent of each other. In that case, 'the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) Once again, "[t]he divisibility of a course of conduct depends upon the intent and objective of the defendant." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.)

The question of whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective

in committing the acts. (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) We review the trial court's findings "'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) We uphold the trial court's findings when supported by substantial evidence. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252-1253.)

In this case, before pronouncing the sentence, the trial court reviewed the probation report and sentencing briefs submitted by the prosecution and defense, and heard argument. Neither the prosecutor nor defendant argued that section 654 applied to this case. The trial court also did not explicitly discuss the application of section 654. However, where the trial court does not make an express finding, an implied finding that the crimes were divisible must be upheld if supported by the evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) "If section 654, subdivision (a) requires that a sentence be stayed, then concurrent terms pursuant to section 669 may not be imposed." (*People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1239.) Where multiple punishment has been improperly imposed, the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)

In this case, the jury was instructed that, to find defendant guilty of false imprisonment by violence or menace, "the People must prove that: [¶] 1. The defendant intentionally restrained, confined, or detained someone by violence or menace; [¶] AND [¶] 2. The defendant made the other person stay or go somewhere against that person's

will. [¶] Violence means using physical force that is greater than the force reasonably necessary to restrain someone. [¶] Menace means a verbal or physical threat of harm, including use of a deadly weapon. The threat of harm may be express or implied."

As it is required to do, when the trial court sentenced defendant on this count, it considered the acts upon which the prosecution relied. (See *People v. McKinzie* (2012) 54 Cal.4th 1302, 1368-1369.) The prosecutor argued that both violence and menace were established by the evidence. Defendant used violence when he physically held the victim down. The prosecutor additionally argued the evidence showed that defendant detained the victim by menace when he brandished the blade. At that point, the victim feared she would be harmed and asked defendant whether he planned to kill her. The prosecutor argued defendant did this because he was not going to "let her break up with him." Defendant would keep her there until she changed her mind about breaking up with defendant. Because defendant never touched the victim with the blade, this act of brandishing the blade is only punishable under the conviction for count 1. Therefore, section 654 does not apply—falsely imprisoning the victim by using the blade—by menace—is punishable only under count 1.

As for the elements of domestic battery, the trial court instructed that the People must prove that: Defendant willfully touched the victim in a harmful or offensive manner; and the victim is the person with whom defendant had a dating relationship. The prosecutor argued the battery occurred because defendant was mad when the victim was breaking up with him. Defendant was angry and jealous, and therefore touched the victim in a harmful and offensive manner.

Although defendant's acts, which led to the convictions for false imprisonment and battery, stemmed from the victim's attempt to end the relationship, the prosecution argued that defendant created two separate objections to deal with the bad news: (1) to make the victim change her mind; and (2) to harm the victim because defendant was angry. The trial court reasonably concluded that defendant's main objective in falsely imprisoning the victim was to force her to change her mind about ending the relationship. It was also reasonable for it to conclude that, when defendant committed the battery, his main objective was to physically harm the victim. Not only did defendant harbor multiple objectives, but the brandishing of the blade—which makes defendant more culpable—is *only* punishable under count 1; section 654 is not applicable.

Moreover, section 654 does not prohibit punishment in this case because defendant had a chance to reflect between the false imprisonment and battery. As noted above, after defendant's initial assault of the victim, defendant exited the truck and could have left. However, he decided to get back in the car. He then started to restrain the victim again, creating a divisible intent between the two events.

One relevant consideration in determining whether multiple crimes should be considered severable for section 654 purposes is the "'temporal proximity'" of the crimes. (*People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10.) Where the offenses are "'separated by periods of time during which reflection was possible,'" section 654 does not prohibit multiple punishment. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689, quoting *People v. Trotter* (1992) 7 Cal.App.4th 363, 368.)

In *People v. Trotter*, *supra*, 7 Cal.App.4th 363, the defendant was convicted of three counts of assault for firing three shots at a police officer who was following him in a freeway chase. The first two shots were about a minute apart, and the third shot came a few seconds later. (*Id.* at p. 366.) The defendant argued that all three shots "manifested the same intent and criminal objective" and therefore could not be punished separately under section 654. (*Trotter*, at p. 367.) The court rejected the argument, stating, "this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. '[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' [Citation.]" (*Id.* at p. 368.)

Moreover, in *People v. Surdi*, *supra*, 35 Cal.App.4th 685, members of a gang beat the victim and took him inside a van, where they stabbed him. Eventually, they drove the victim to a riverbed and took turns stabbing him some more while another assailant kicked him. (*Id*. at p. 687) The defendant, one of the attackers, argued that section 654 prohibited separate punishment for kidnapping and mayhem, because the kidnapping was for the sole purpose of beating the victim. (*Surdi*, at p. 688.) The court rejected the argument, finding that the kidnapping and mayhem "did not arise from a single volitional act. Rather, they were separated by considerable periods of time during which reflection was possible. . . . [¶] The fact Surdi assisted *multiple* stabbing episodes, each of which

evinced a *separate intent* to do violence, precludes application of section 654 with respect to the offenses encompassed within the episodes." (*Id.* at pp. 689-690.)

In this case, as in *People v. Trotter*, *supra*, 7 Cal.App.4th 363, defendant committed each act voluntarily, by his own calculations, and each act was separated by a period of time in which reflection was possible. After defendant got out of the car to confront the witness, defendant had the opportunity reflect on his actions and decide whether or not to continue his violent behavior toward the victim. After she expressed an intention to break off the relationship, defendant took the victim's keys and tried to force her to change her mind. When she honked the horn to get help, defendant chose to elevate the crime by brandishing a knife. He then got out of the car, exchanged words with a witness, and could have chosen to end the assault. Instead, defendant made a conscious decision to get back into the car. He then started to assault the victim again, pinning her down and causing bruising. Defendant "'should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' [Citation.]" (*Id.* at p. 368, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 338.)

The purpose of section 654 is to ensure that defendant's punishment "'will be commensurate with his culpability.'" (*People v. Latimer*, *supra*, 5 Cal.4th at p. 1211.) Here, by using menace to continue the false imprisonment of the victim through the use of a blade, and by prolonging the attack after interruption, defendant is more culpable than had he only bruised the victim. Therefore, section 654 does not apply. The trial court properly sentenced defendant on counts 1 and 3.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.